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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 E.H. and C.S., *on behalf of themselves and*
12 *all others similarly situated,*

13 Plaintiffs,

14 v.

15 META PLATFORMS, INC.,
16 Defendant.

Case No. 3:23-cv-04784-WHO

**PLAINTIFFS MOTION AND NOTICE OF
MOTION FOR LEAVE TO AMEND
THEIR COMPLAINT**

Action Filed: September 18, 2023

Honorable Judge William H. Orrick

17
18 **NOTICE OF MOTION AND MOTION**

19 PLEASE TAKE NOTICE that on February 26, 2025 at 2:00 p.m., before the Honorable
20 William H. Orrick of the United States District Court for the Northern District of California,
21 Courtroom 2, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiffs E.H. And C.S. will, and
22 hereby do, move this Court pursuant to Federal Rule of Civil Procedure 15(a)(2) for leave to amend
23 their Complaint. The motion is based upon this notice of motion; the memorandum of points and
24 authorities in support thereof that follows; the proposed order filed concurrently herewith; the request
25 for judicial notice and accompanying declaration; the pleadings, records, and papers on file in this
26 action; oral argument of counsel; and any other matters properly before the Court.

STATEMENT OF ISSUES TO BE DECIDED

Should Plaintiffs be granted leave to amend their Complaint?

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1 Plaintiffs respectfully submit this Memorandum of Law in support of their Motion for Leave
 2 to File [Proposed] First Amended Complaint (the “PFAC”), pursuant to Federal Rule of Civil
 3 Procedure 15(a)(2). Plaintiffs’ PFAC is attached to the corresponding Declaration of Abigail Burman
 4 in Support of Plaintiffs’ Motion for Leave to File [Proposed] First Amended Complaint as Exhibit A.
 5 For the Court’s convenience, a redline showing Plaintiffs’ proposed changes from their initial
 6 Complaint is attached as Exhibit B. The PFAC will not cause undue prejudice to Meta. There has
 7 been no undue delay or bad faith, and it is not futile.

8 Prior to filing this Motion, on January 23, 2025, Counsel for Plaintiffs contacted Counsel for
 9 Meta to discuss whether they would consent to Plaintiffs’ amendment. On January 27, 2025, Meta
 10 replied that they would not consent to amendment.

11 **I. Background**

12 Plaintiffs filed their Complaint on September 18, 2023. The only defendant is Meta, and the
 13 complaint accordingly focuses on Meta’s conduct. Plaintiffs allege that *Meta* designed, built, and
 14 distributed the Pixel for the purpose of illicitly intercepting and profiting from personal health
 15 information of class members, Compl. ¶ 2, 5-6, 60-69, 88 98, 141. *Meta* was the “stranger lurking in
 16 the corner of their digital doctors’ offices.” Pls.’ Opp’n to Mot. to Dismiss, ECF 45, at 3. The putative
 17 class was not limited to people who used any specific health care provider, and included all people
 18 without a Facebook account who had had their sensitive health information intercepted by Meta. As
 19 Meta acknowledged in its Motion to Dismiss, Plaintiffs are “seeking monetary and injunctive relief
 20 on behalf of themselves and a putative class of people without a Facebook account whose health
 21 information was obtained without their consent by Meta from a Covered Entity, which plaintiffs
 22 define as third-party companies subject to the Health Insurance Portability and Accountability Act
 23 (‘HIPAA’) or the California Medical Information Act (‘CMIA’).” Meta Mot. to Dismiss (“MTD”),
 24 ECF 34, at 3.

25 Meta moved to dismiss only Plaintiffs’ California Unfair Competition Law (UCL), California
 26 Consumers Legal Remedies Act (CLRA), and conversion claims, and only as to the individual named
 27 plaintiffs. *See* MTD at 2 (defining “Plaintiffs” as named Plaintiffs E.H. and C.S.). At no point during
 28

1 the Motion to Dismiss briefing process did Meta challenge Plaintiffs’ broader class definition or move
 2 to strike the class allegations. On February 12, 2024, the Court denied Meta’s motion in its entirety.
 3 Order on Meta Mot. to Dismiss, ECF 56, at 16.

4 Months later, after receiving Plaintiffs’ first set of discovery requests, Meta abruptly changed
 5 course. In its responses and Objections, Meta argued – for the first time – that “Covered Entities”
 6 only included Cerebral and Monument and refused to produce discovery related to any other third-
 7 party HIPAA and/or CMIA covered entities. Joint Letter Br., ECF 85, at 1. During the parties’ first
 8 meet and confer, Plaintiffs asked if Meta intended to stand on this objection. Burman Decl. ¶ 5. For
 9 two months, Meta did not respond. *Id.* at ¶¶ 6-7. As soon as Meta confirmed that it would stand on
 10 this position, Plaintiffs moved to compel. In the course of the briefing, Meta *again* altered its position,
 11 arguing – again for the first time – that Plaintiffs were only entitled to discovery related to Cerebral.¹
 12 Joint Letter Br., ECF 85, at 4-6. On December 4, 2024, Judge DeMarchi denied Plaintiffs’ motion to
 13 compel. ECF 93.

14 From the inception of this case, Plaintiffs always intended the class definition to broadly
 15 include any and all HIPAA and CMIA covered entities. Although Plaintiffs believe Meta also
 16 appreciated the breadth of the class definition, it now seeks to inappropriately narrow the class
 17 definition through delay tactics. Thus, in the interest of efficiency and to avoid further confusion and
 18 delay, Plaintiffs now seek leave to amend their complaint to clarify the definition of Covered Entity
 19 and the scope of the putative class. This is consistent with the Court’s Order denying Defendant’s
 20 Motion to Dismiss and the Court-ordered schedule.

21 **II. Legal Standard**

22 Under Federal Rule of Civil Procedure 15(a)(2), a court should “freely give leave” to amend
 23 a pleading “when justice so requires.” Fed. R. Civ. P. 15(a)(2). “[T]his policy is to be applied with
 24 extremely liberality,” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990),
 25 and “the nonmoving party bears the burden of demonstrating why leave to amend should not be
 26 _____

27 ¹ Notably, this position also contradicted Meta’s Motion to Consolidate, which claimed that “the
 28 Non-User Action complaint focuses solely on *two* healthcare providers.” Meta’s Mot. to
 Consolidate, ECF 74, at 7 (emphasis added).

granted,” *Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 530-31 (N.D. Cal. 1989). In determining whether to grant leave to amend, courts examine whether the proposed amendment “(1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile.” *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006). “Generally, this determination should be performed with all inferences in favor of granting the motion.” *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). These factors are not weighed equally. “[I]t is generally accepted that prejudice and bad faith are the most important factors to consider,” *Codexis, Inc. v. EnzymeWorks, Inc.*, 2017 WL 4236860, at *2 (N.D. Cal. Sept. 25, 2017), and “delay alone no matter how lengthy is an insufficient ground for denial of leave to amend,” *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981). “Absent prejudice, or a strong showing of any of the remaining [] factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (emphasis original).

III. Argument

a. The proposed amendment is not prejudicial.

Prejudice is the “touchstone” of the Rule 15(a)(2) analysis. *Fujifilm Corp. V. Motorola Mobility LLC*, 2014 WL 2730724, at *1 (N.D. Cal. June 16, 2014). Courts in the Ninth Circuit have consistently rejected claims of prejudice when plaintiffs move to amend the complaint in accord with a court ordered deadline. *See PNY Techs., Inc. v. SanDisk Corp.*, 2014 WL 294855, at *5 (N.D. Cal. Jan. 27, 2014) (“SanDisk has a heavy burden of showing prejudice given that the motion to amend the pleadings came with four months remaining for discovery and within the time period for making a motion to amend”); *Khasin v. R.C. Bigelow*, 2015 WL 4104868, at *3 (N. D. Cal. July 7, 2015) (“[D]iscovery is scheduled to remain open for nearly another year and trial is approximately fifteen months away. In light of that schedule, Bigelow’s general allegations of delay do not establish that it will be prejudiced.” (citations omitted)). Under the current schedule, discovery will not close until September 11, 2025, and the deadline to amend is not until November 13, 2025. ECF 71. Furthermore, Plaintiffs have been pursuing discovery related to HIPAA and CMIA covered entities since the very beginning of the discovery process. *See PNY*, at *5 (distinguishing between case that had been

1 pending for two years without plaintiff pursuing discovery and instant case where parties were
 2 actively engaged in discovery, and finding that amendment would not be prejudicial). Because this
 3 amendment comes as no surprise to Defendants and is squarely within the Court’s deadlines, there is
 4 no prejudice.

5 **b. There is no evidence of bad faith or undue delay.**

6 Plaintiffs’ motion is neither made for any improper purpose nor untimely. Far from being
 7 “presented for the purpose of prolonging the litigation” or to “harass or burden” Meta, *Finjan, Inc. V.*
 8 *Check Point Software Techs., Inc.*, 2019 WL 1455333, at *6 (N.D. Cal. Apr. 2, 2019), Plaintiffs’
 9 motion is consistent with Meta’s own proposal for addressing the parties’ disagreement over the
 10 definition of Covered Entity. At the hearing before Judge DeMarchi, Meta proposed a motion to
 11 amend as the most expeditious way to resolve the dispute. 21:14-24. And, in contrast to the constantly
 12 shifting sands of Meta’s arguments, *supra* 1-2, Plaintiffs have maintained the same position from the
 13 inception of their case through the filing of this motion: their complaint was intended to and was
 14 understood by the parties to encompass all Facebook non-users who had their sensitive health
 15 information intercepted by Facebook without their content. This belies any claims of bad faith or
 16 surprise.

17 Plaintiffs have aggressively pursued the covered entities dispute since it was first raised (in its
 18 first iteration) by Meta and moved to amend in a timely fashion following Judge DeMarchi’s ruling.
 19 *See Codexis*, at *3 (finding no undue delay where “prior to bringing this motion, [plaintiff] tried to
 20 work with defendants to either be provided with sufficient clarification to eliminate its concerns on
 21 the issue or to stipulate to an amendment of its complaint without requesting leave from the court”);
 22 *Zeiger v. WellPet LLC*, 2018 WL 3208160, at *3 (N.D. Cal. June 29, 2018) (“A four month delay . .
 23 . is not undue delay.”). The fact that Plaintiffs are within the deadline by the court to amend their
 24 complaint likewise “strongly shows that [Plaintiffs] did not unduly delay.” *PNY*, at *4.

25 **c. The proposed amendment is not futile.**

26 Finally, Plaintiffs’ amendment would not be futile. As an initial matter, “[f]utility . . . is a high
 27 standard.” *Staley v. Gilead Sciences*, 2021 WL 5906049, at *3 (N.D. Cal. Dec. 14, 2021). “Courts
 28

1 rarely deny a motion for leave to amend for reason of futility,” particularly when discovery has not
2 been completed. *Hynix Semiconductor Inc. v. Toshiba Corp.*, 2006 WL 3093812, at *2 (N.D. Cal.
3 Oct. 31, 2006). The test for determining the sufficiency of a proposed amended complaint is identical
4 to the test used to assess motions brought under Rule 12(b)(6), *Nordyke v. King*, 644 F.3d 776, 788
5 n.12 (9th Cir. 2011), including the requirement that the plaintiffs’ allegations be viewed in the light
6 most favorable to the plaintiffs. *See Staley*, at *3 (holding that plaintiffs’ amendment would not be
7 futile because plaintiffs’ dispute the relevant facts and “[plaintiffs’] allegations must be assumed as
8 true for purposes of the instant motion”).

9 Here, Meta cannot meet its burden in showing futility because the Court has already held that
10 Plaintiffs’ claims for invasion of privacy, violation of the UCL, violation of the CLRA, and
11 conversion may proceed. Order on Meta Mot. to Dismiss, ECF 56, at 16. And, as Meta acknowledged
12 in its Motion to Dismiss, MTD at 1, the Court’s decision in *Doe v. Meta Platforms, Inc.*, 690 F. Supp.
13 3d 1064 (N.D. Cal. 2023) allowing the plaintiffs’ federal wiretapping, California wiretapping, and
14 unjust enrichment claims to proceed against Meta also applies to Plaintiffs’ claims in this case.
15 Plaintiffs’ proposed amendment does not add to or alter these claims or the relevant allegations.

16 **IV. Conclusion**

17 For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion
18 for Leave to File [Proposed] First Amended Complaint.

1 DATED: January 27, 2025

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